

'One Who Practiced...'

By Anthony Lewis

BOSTON, March 13—The White House obviously expects bad news on the subject of President Nixon's taxes: a finding that he owes several hundred thousand dollars. In anticipation, it has already retreated to the usual last line of defense—that any wrongdoing was not his fault. He was too busy to worry about tax returns, it is said; any blame attaches to the accountants and lawyers.

In that connection there is one extremely interesting fact. Mr. Nixon's sometime tax lawyer, Frank DeMarco Jr., has twice invoked the lawyer-client privilege and refused to tell authorities about a 1970 talk with Mr. Nixon on his tax affairs.

Under law, the lawyer-client privilege is for the benefit of the client, not the lawyer. Mr. Nixon could quite simply tell Mr. DeMarco to stop invoking it. The Joint Congressional Committee that is investigating his returns is apparently about to ask the President to do just that. If he does not, some citizens might wonder what he is hiding. Can it be that his taxes involve national security?

Mr. DeMarco and his partner, Herbert Kalmbach, spent half an hour with President Nixon on April 10, 1970. They went over Mr. Nixon's return—the crucial one that claimed a deduction for Mr. Nixon's "charitable contribution" of papers valued at \$76,000. According to reports, Mr. DeMarco has told investigators that the President checked each page, signing the return. But he would not go beyond that to describe the discussion.

While Mr. DeMarco was in the White House that same day in April, 1970, he notarized a deed that allegedly gave the papers to the National Archives. The deed was dated March 27, 1969, and the notary's signature backdated to April 31, 1969. He says that there was an earlier copy, but it has never been found.

That backdating is highly suggestive of tax fraud, which the courts have described as conduct likely to "mislead or conceal" on a "material" issue. The dates were material, indeed highly significant, because the gift had to be made before July 25, 1969, in order to escape a tax reform act that ended deductions for such gifts.

It is now indicated, by persons familiar with the investigation, that the backdated deed was never shown to the Internal Revenue Service agents who audited the Nixon returns—and they were not curious enough to ask to see a deed. Some experts think the backdating was then not "material," since no agent saw the deed and was misled. Others say the preparation of a falsely-dated document, even for use only if necessary, signifies a fraudulent intent.

In any event, if the I.R.S. never saw the deed, another document becomes

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relevant. As required by tax regulations, a statement was attached to the 1969 return giving details of the claimed charitable gift. The statement had five paragraphs. The last read:

"5. Restrictions: None. The gift was free and clear, with no rights remaining in the taxpayer."

In fact, the deed contained substantial restrictions. It used the very word "restrictions" three times. While Mr. Nixon remained President, it said, no one could have access to the papers but him or persons he designated in writing, and he reserved all rights of reproduction.

Was the false denial of restrictions a "material" deception? At the very least, the concealed terms of the gift reduced its value: the Archives did not really get full ownership for years and any property is worth less if you can only use it years from now. Furthermore, the bland assurance that there were no restrictions could have kept agents from asking to see a deed that may itself have been fraudulent.

For these and other reasons, a number of tax lawyers think there is a likely case of fraud here. That would mean a civil penalty of 50 per cent of all unpaid tax, and possibly a criminal prosecution.

The remaining question is Mr. Nixon's responsibility for any fraud committed. The Congressional joint committee apparently plans to leave this prickly one to the I.R.S. and the House impeachment inquiry. The I.R.S., concerned about a backlash from taxpayers resentful of the President's money payments, is at last taking a hard look. It is understood to have assigned a special agent to the Nixon investigation—a step usually taken only when there is suspicion of criminal fraud.

Some evidence on Mr. Nixon's attitudes has been published, and it does not exactly make him sound like a man uninterested in his own tax returns. In White House memorandums his aides said he proposed deducting the cost of wedding gifts to Congressmen's daughters and flowers for funerals; indeed, he opined that "a public man does very little of a personal nature" and hence can deduct just about any expense. His aides said he wanted to see returns of past Presidents to check for likely deductions.

The courts often find taxpayer responsibility for fraud in such circumstantial evidence. A broader factor mentioned is whether the taxpayer was a person of "business and financial experience," one aware of the tax law. In Mr. Nixon's case it may be relevant that he is a lawyer—"formerly," as he told a press conference on May 1, 1971, "one who practiced a good deal of tax law."